



If there is a constant in the criminal law, it is that changes happen, often when you least expect them. That truism was recently proven correct by the Kentucky Supreme Court's published opinion in Gary Lloyd v. Commonwealth of Kentucky, 2008-SC-000206-MR, on October 21, 2010. That decision immediately and radically impacted the way police officers and prosecutors charge and try robbery cases in the commonwealth. This decision does not overturn the hope of prosecuting robbers in Kentucky — the sky has neither fallen, nor is it falling — but Lloyd does effect directly the way robbery cases should be charged and must ultimately be presented by instructions to juries.

THE LAW AS WE KNEW IT: BLOCKBURGER AND DOUBLE JEOPARDY.

Double Jeopardy is the principle that one cannot twice be held to answer for the same crime. As the Court noted in Lloyd, the Kentucky Constitution, Section 13, states “[n]o person shall, for the same offense, be twice put in jeopardy of his life or limb....” The Fifth Amendment of the Bill of Rights shares this restriction on the power of government. Black’s Law Dictionary defines double jeopardy as “the fact of being prosecuted twice for substantially the same offense.” The basic idea is thus that the government shall not try a person criminally over and over, despite either acquittal or guilty verdict, for the same crime.

Does that mean a person who robs, kidnaps, and rapes the same victim can only be convicted of one of those crimes?

Intuitively, we would say of course it does not mean that: as it would be both illogical and unjust. A person should answer for his crimes, the law does not exist solely to protect the accused and the wrong deed must be punished. How to strike the balance between not committing Double Jeopardy and holding defendants accountable for multiple crimes committed during the same course of conduct was historically met by following the United States Supreme Court’s reasoning in Blockburger v. U.S., 284 U.S. 299 (1932).

Blockburger states that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” Kentucky, as the Lloyd Court notes, quoting from Com. v. Burge, 947 S.W.2d 805 (Ky. 1996), uses the Blockburger test, which it distills artfully to the phrase, “is one offense included within another?”

BLOCKBURGER IS NOT ENOUGH!

The Kentucky High Court, however, opines in Lloyd that reviewing Blockburger alone is not sufficient. In other words, one cannot merely read the elements of robbery and theft in Kentucky Revised Statutes to see if there is any element which is different between the two. If that were all (i.e. if the Blockburger rule alone were applied), conviction for both robbery and theft in Kentucky would not violate the Double Jeopardy clause and Gary Lloyd’s conviction for both threatening drug store employees with a handgun while stealing OxyContin pills would have withstood appeal. The Kentucky Supreme Court reasoned, however, that since the Blockburger Double Jeopardy rule is a rule of statutory construction, meant to guide courts interpreting statutory language, the Blockburger rule is trumped by the expressed intent of the persons who drafted the Kentucky statutes on theft and robbery: in other words, the General Assembly. >>